INDEX TO BRIEF.

	Page
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATUTORY PROVISIONS INVOLVED	2
COUNTERSTATEMENT OF QUESTION PRESENTED	2
COUNTERSTATEMENT OF THE CASE	3
ARGUMENT	5
The Case Presents No Substantial Question Not Previously Resolved in Appellees' Favor by This Court	5
CONCLUSION	11

TABLE OF CITATIONS.

Cases: Page

Douglas Independent School District No. 3 v. Jorgenson, 293 F. Supp. 849 (D. S. D. 1968) 9
Fitzgerald v. Catherwood, 388 F. 2d 400 (2d Cir. 1968), cert. denied, 391 U. S. 934 (1968) 5
Hines v. Davidowitz, 312 U. S. 52 (1941) 9
Jones v. Rath Packing Co., 430 U. S. 519 (1977) 9
King v. Smith, 392 U. S. 309 (1968) 9
MacManus v. Love, 179 Colo. 218, 499 P. 2d 609 (1972) 9
Merchants' Bank v. Pennsylvania, 167 U. S. 461 (1897) 8
Missouri, Kansas and Texas Railway v. Haber, 169 U. S. 613 (1898) 5
Navajo Tribe v. Arizona Dept. of Administration, 111 Ariz. 279, 528 P. 2d 623 (1975) 9
New York State Dept. of Social Services v. Dublino, 413 U. S. 405 (1973) 5
Opinion of the Justices, 381 A. 2d 1204 (N. H. 1978) 8
Opinion of the Justices to the Senate, Mass. Adv. Sh. 1978, 1811, 378 N. E. 2d 433 (1978) 9
Ray v. Atlantic Richfield Co., — U. S. —, 98 S. Ct. 988 (1978) 9
Schwartz v. Texas, 344 U. S. 199 (1952) 5
Shapp v. Sloan, 27 Pa. Cmwlth. 312, 367 A. 2d 791 (1976), aff'd, — Pa. —, January Term 1977, No. 214 (July 19, 1978) 4, 8
Shepheard v. Godwin, 280 F. Supp. 869 (E. D. Va. 1968) 9
State ex rel. Sego v. Kirkpatrick, 86 N. M. 359, 524 P. 2d 975 (1974) 9
Townsend v. Swank, 404 U. S. 282 (1971) 9
Wheeler v. Barrera, 417 U. S. 402 (1974) 7, 8, 10
Woolfolk v. Brown, 325 F. Supp. 1162 (E. D. Va. 1971), aff'd, 456 F. 2d 652 (4th Cir. 1972), cert. denied, 409 U. S. 885 (1972) 9

TABLE OF CITATIONS (Continued).

Constitutions: Page

Missouri Constitution, article 9, section 5 ..... 7, 8
Pennsylvania Constitution, article III, section 24 2
United States Constitution:
Amendment X 2, 10
article IV, section 4 10
article VI, clause 2 ..... 2, 3, 8, 10

Statutes:

Act of June 29, 1976, No. 117, 1976 Pa. Laws 469, 72 P. S. §§ 4611-4617 (Supp. 1978) 2, 3, 4, 6, 7, 10
Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, 42 U. S. C. A. §§ 4571, et seq. 6
Elementary and Secondary Education Act of 1965, as amended, 20 U. S. C. A. § 241(a) et seq. 7
Federal Augmentation Act of 1976, Act of July 1, 1976, No. 17-A, 1976 Pa. Laws 1383 ..... 2, 3, 4, 6, 7, 8, 10
Intergovernmental Personnel Act of 1970, 42 U. S. C. A. §§ 4701 et seq. 6
Library Services and Construction Act, 1956, as amended, 20 U. S. C. A. §§ 351 et seq. 6
Omnibus Crime Control and Safe Streets Act of 1968, 42 U. S. C. A. §§ 3701 et seq. 6

Other Authorities:

S. Rep. No. 1097, 90th Cong., 2d Sess., reprinted in [1968] U. S. Code Cong. & Ad. News 2112, 2239, 2276-78 9

IN THE

Supreme Court of the United States

No. 78-642.

MILTON J. SHAPP, Governor; GERALD GORNISH, Acting Attorney General; CARYL M. KLINE, Secretary of Education; GEORGE S. PULAKOS, Secretary of Transportation; LEONARD BACHMAN, M.D., Secretary of Health; KENT D. SHELHAMER, Secretary of Agriculture; MAURICE K. GODDARD, Secretary of Environmental Resources, and THE GOVERNOR'S JUSTICE COMMISSION,

Appellants,

v.

ROBERT E. CASEY, State Treasurer

and

THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSLYVANIA,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

MOTION OF APPELLEE, THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, TO DISMISS OR AFFIRM.

The appellee, The General Assembly of the Commonwealth of Pennsylvania, respectfully moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Pennsylvania on the ground that the question raised by Appellants is not sufficiently substantial to warrant further proceedings.

CONSTITUTIONAL PROVISIONS INVOLVED.

Article VI, clause 2 of the Constitution of the United States and article III, section 24 of the Pennsylvania Constitution are set forth in Appellants' Jurisdictional Statement, at p. 5. They need not be repeated herein.

Article IV, section 4 of the Constitution of the United States provides:

> "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion and an Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

Amendment X of the Constitution of the United States provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATUTORY PROVISIONS INVOLVED.

The state statutes involved in this case, Act 117 of 1976, 72 P. S. §§ 4611-4617 (Supp. 1978), and the Federal Augmentation Act of 1976, No. 17-A, 1976 Pa. Laws 1383, are set forth in Appellants' Jurisdictional Statement, at pp. 6-7. They need not be repeated herein.

COUNTERSTATEMENT OF QUESTION PRESENTED.

I. Where acts of Congress grant federal augmentation funds to the states for use in state programs and a state's Constitution provides that no money paid into the state treasury shall be disbursed except on appropriations made by law, are state enactments requiring and specifying legislative appropriations of federal augmentation funds valid under the Supremacy Clause of the United States Constitution?

COUNTERSTATEMENT OF THE CASE.

This appeal questions the validity of Pennsylvania Acts 117 and 17-A of 1976 under the Supremacy Clause of the United States Constitution, article VI, clause 2.

Act 117 of 1976, 72 P. S. §§ 4611-4617, provides that both federal augmentation grants [1] to the Commonwealth and state matching funds shall be paid out of the state treasury only upon specific appropriations by the General Assembly. The Federal Augmentation Act of 1976, No. 17-A, 1976 Pa. Laws 1383, sets forth, in specific line accounts, appropriations for fiscal year 1976-77 of monies in the state treasury derived from Federal augmentation funds.

This legislation was enacted upon the recommendations of the Pennsylvania Economy League to the Governor and the General Assembly,[2] and in response to numerous abuses by the Executive Branch in the use of federal augmentation funds.[3]

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1. Federal "augmentation grants" or "augmentation funds" are simply federal monies given to the states for use in *state* programs. They are to be distinguished from federal funds which flow through the states for the funding of *federal* programs.

2. "Fiscal Planning, Legislation and Implementation for Pennsylvania," report II, Executive Budget Process in Pennsylvania, at p. 57; report III, Legislative Budget Process in Pennsylvania, at p. 4, quoted by the Senate majority leader, Mr. Irvis, during debate on Senate Bill 1542 (Act 117), June 16, 1976.

3. For example, after the General Assembly became concerned over the increasing size of the Central Office staff of the Drug and Alcohol Abuse Council and made cutbacks in its budget from non-federal funds, the agency subverted the legislative intent by reallocating federal augmentation funds from the already financially-strapped field programs for the treatment of drug and alcohol

The Executive Branch challenged Acts 117 and 17-A on state and federal constitutional grounds in the Commonwealth Court of Pennsylvania, which unanimously upheld the legislature's constitutional right to control the spending of federal augmentation funds. *Shapp v. Sloan*, 27 Pa. Cmwlth. 312, 367 A. 2d 791 (1976).

In affirming that decision, the Supreme Court of Pennsylvania explicitly rejected the Executive's contention that Acts 117 and 17-A violated the Supremacy Clause of the United States Constitution:

> "Appellants [the Executive Branch] have reiterated throughout their brief that it is federal policy to allow state governments as much control as possible over these federally funded programs. It cannot, therefore, be considered an encroachment upon federal supremacy that the legislature, rather than the executive, exercises the discretion granted the state government by the Congress." *Shapp v. Sloan*, No. 214, January Term, 1977 (July 19, 1978), slip opinion, at p. 21 (21a).

Appellants seek review of that decision by this Court. As set forth in the Argument below, The General Assembly of Pennsylvania respectfully submits that the decision of the Pennsylvania Supreme Court was correct and the appeal should be dismissed for failure to raise a substantial question.

In the alternative, The General Assembly respectfully moves Your Honorable Court to affirm the judgment of the Pennsylvania Supreme Court without additional briefing or argument.

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3. (Cont'd.)
addicts back to the Central Office so that the cutbacks could be circumvented. Answer of Intervenors, The General Assembly of the Commonwealth of Pennsylvania, to the Petition for Review of Governor Milton J. Shapp, *et al.*, at pp. 7-8.

ARGUMENT.

The Case Presents No Substantial Question Not Previously Resolved in Appellees' Favor by This Court.

This Court has repeatedly held that

> "[t]he exercise of federal supremacy is not lightly to be presumed." *New York State Dept. of Social Services v. Dublino*, 413 U. S. 405, 413 (1973), quoting *Schwartz v. Texas*, 344 U. S. 199, 202-203 (1952).

Only where the conflict between a state and federal enactment is

> "so direct and positive that the two acts cannot be reconciled or stand together," (*Missouri, Kansas and Texas Railway v. Haber*, 169 U. S. 613, 623 (1898)),

will the state enactment be held to conflict with federal law. *New York State Dept. of Social Services v. Dublino, supra; Missouri, Kansas & Texas Railway v. Haber, supra; Fitzgerald v. Catherwood*, 388 F. 2d 400 (2d Cir. 1968), *cert. denied*, 391 U. S. 934 (1968).

There is no "direct and positive" conflict between state and federal law here and no need for this Court's intervention.

The decision of the Pennsylvania Supreme Court in this case sustained the state and federal constitutional right of the General Assembly to oversee the appropriation of funds in the state treasury and to assume ultimate responsibility for the coordination of the fiscal policy of the Commonwealth of Pennsylvania. That decision was clearly correct. As that court noted, the General Assembly has historically asserted and exercised some fiscal control over

federal aid funds. (8a) Act 117 and 17-A are no more than the logical and appropriate extension of that historic exercise of control now that federal monies have become an increasingly significant proportion of total monies available for expenditure in Pennsylvania.

Furthermore, not only is there no "direct and positive" conflict between Pennsylvania Acts 117 and 17-A and the federal augmentation legislation, but the Pennsylvania legislation in fact implements the federal statutory scheme.

Contrary to Appellants' assertion at page 14 of the Jurisdictional Statement, the federal augmentation legislation involved in this case provides for grants to the states for state programs to be administered in accordance with state law. The only additional strictures are requirements assuring audit integrity and a state liaison agency.[4] No exclusive role has been established for the executive branch of state government. Indeed, the congressional Advisory Commission on Intergovernmental Relations has urged state legislatures to increase their role in the spending of federal grant monies. (22a) Congress has not disapproved that recommendation. As the Pennsylvania Supreme Court noted in this case:

> "There is no evidence before us to indicate that Congress considers such state legislative involvement an encroachment upon the supremacy of the federal government." (22a)

Moreover, the recent decision of Your Honorable Court in *Wheeler v. Barrera*, 417 U. S. 402 (1974), establishes beyond question that there is no "direct and positive" conflict between the state enactments and the federal enactments at issue in the present case.

In *Wheeler v. Barrera, supra*, this Court held that federal grants to a state are subject to the state's duty and power to control its own financial well-being consonant with its constitutional requirements. It was precisely that duty and power which The General Assembly exercised in making line account appropriations of the federal augmentation funds in this case.

Wheeler dealt with Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U. S. C. A. § 241(a) *et seq.*[5] Title I provides federal funding for special programs for educationally deprived children in private as well as public schools. The Missouri Constitution prohibits the use of "public" funds in private schools. Reversing the lower court's ruling that the state constitutional proscription did not apply to federal Title I funds, this Court stated:

> "Title I evinces a clear intention that state constitutional spending proscriptions not be preempted as a condition of accepting Federal Title I funds." 417 U. S. at 417.

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4. For example, the disjunctive scheme of section 303 of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, 42 U. S. C. A. §§ 4571, *et seq.*, 4573, plainly manifests the congressional intent to avoid any mandate which might run afoul of constitutional or statutory precepts governing administrative procedure, separation of powers, or delegation of powers in any state:

> "[T]he State may designate a single State agency as the sole agency for the administration of the [State] plan *or* designate such agency as the sole agency for supervising the administration of the plan. . . ." (emphasis added).

See also, Intergovernmental Personnel Act of 1970, 42 U. S. C. A. §§ 4701 *et seq.*, 4702 (full recognition of the rights, powers and responsibilities of state and local governments); Library Services and Construction Act, 1956, as amended, 20 U. S. C. A. §§ 351 *et seq.*, 351(b) (state and local initiative in the conduct of library services); Omnibus Crime Control and Safe Streets Act of 1968, 42 U. S. C. A. §§ 3701 *et seq.*, 3726 (state legislature to review state plan for "possible conflicts with State statutes or prior legislative Acts"); 3766(a) (no federal control over state or local law enforcement agencies).

5. The Pennsylvania legislation upheld in the present case specifically covers this Federal augmentation enactment. Act 17-A of 1976, 1976 Pa. Laws 1383, 1392.

This Court then went on to hold:

> "[W]hether Federal aid is money 'donated to any state fund for public school purposes,' within the meaning of the Missouri Constitution, Art. 9, § 5, is *purely a question of state* and not federal law." 417 U. S. at 418, 419. (emphasis added).

The Pennsylvania courts have considered and ruled upon the question at issue here as a question of state law, just as *Wheeler* directs. Acts 117 and 17-A have been upheld under the Pennsylvania Constitution. *Shapp v. Sloan*, 27 Pa. Cmwlth. 312, 367 A. 2d 791 (1976), *aff'd*, — Pa. —, January Term 1977, No. 214 (July 19, 1978), slip opinion (5a).

As those courts properly held, federal block grants to the Commonwealth are subject to the appropriation power of the General Assembly and may not be expended absent specific legislative appropriations:

> "The [Pennsylvania] constitution says 'no money' shall be paid without an appropriation. We think the constitution means exactly what it says." (17a)

Cf. *Opinion of the Justices*, 381 A. 2d 1204 (N. H. 1978). As the final decision of the highest court of the state construing the state constitution, that determination is conclusive and may not be disturbed by this Court on appeal. *Merchants' Bank v. Pennsylvania*, 167 U. S. 461 (1897).

Inasmuch as *Wheeler v. Barrera, supra*, has recognized that the federal monies in question are subject to state constitutional provisions, it is clear that the Pennsylvania legislation does not conflict with federal law. Therefore, as the Pennsylvania courts held, it is also valid under the Supremacy Clause of the Constitution of the United States, article VI, clause 2.

The cases cited by Appellants are not to the contrary. *MacManus v. Love*, 179 Colo. 218, 499 P. 2d 609 (1972) (cited by Appellants at p. 16 of the Jurisdictional Statement), never reached the federal constitutional validity of the state appropriations bill. That question was not even raised in *Opinion of The Justices to the Senate*, Mass. Adv. Sh. 1978, 1811, 378 N. E. 2d 433 (1978) (also cited at p. 16). Both decisions rested wholly upon interpretations of the respective state constitutional provisions.

Navajo Tribe v. Arizona Dept. of Administration, 111 Ariz. 279, 528 P. 2d 623 (1975); *State ex rel. Sego v. Kirkpatrick*, 86 N. M. 359, 524 P. 2d 975 (1974) (cited by Appellants at p. 16); *Douglas Independent School District No. 3 v. Jorgenson*, 293 F. Supp. 849 (D. S. D. 1968); and *Shepheard v. Godwin*, 280 F. Supp. 869 (E. D. Va. 1968) (cited at p. 14, n. 4) did not involve federal grants to *states*. Accordingly, those cases are not on point.[6]

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6. Other cases cited by Appellants are likewise inapplicable. The following cases involved direct conflicts between state and federal requirements in a categorical assistance program over which, unlike in the case of the block grants at issue in this case—where the states are accorded the major share of responsibility for administration (see note 3 *supra*)—the Federal Government has reserved greater control: *Townsend v. Swank*, 404 U. S. 282 (1971); *King v. Smith*, 392 U. S. 309 (1968) (cited at pp. 12-13); *Woolfolk v. Brown*, 325 F. Supp. 1162 (E. D. Va. 1971), *aff'd*, 456 F. 2d 652 (4th Cir. 1972), *cert. denied*, 409 U. S. 885 (1972) (cited at p. 14, n. 4).

Other cases cited by Appellants involved state regulation in areas which required national uniformity: *Ray v. Atlantic Richfield Co.*, — U. S. —, 98 S. Ct. 988 (1978); *Jones v. Rath Packing Co.*, 430 U. S. 519 (1977); *Hines v. Davidowitz*, 312 U. S. 52 (1941) (cited at p. 15). As already discussed (*see text* at n. 3, *supra*), the federal augmentation legislation at issue in the present case accords the states wide latitude over specific spending decisions and encourages individualized responses to what are essentially local problems. *See also*, S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* [1968] *U. S. Code Cong. & Ad. News* 2112, 2239, 2276-78.

As the Supreme Court of Pennsylvania recognized:

> "The federal government has expressly given the states a wide discretion in dealing with these [federal grant] funds. That discretion is most logically exercised by the branch of state government which is constitutionally empowered to exercise control over *all* expenditures." (23a, emphasis in original)

The decision of this Court in *Wheeler v. Barrera, supra,* confirms that the Pennsylvania Supreme Court was correct.

We respectfully submit that *Wheeler v. Barrera, supra,* is dispositive of the question raised by Appellants in the Jurisdictional Statement. Clearly, Acts 117 and 17-A of 1976 do not violate the Supremacy Clause, and no substantial question is presented.

Indeed were this result not patently correct, extremely difficult questions of federalism would arise, commencing, perhaps, with article IV, section 4 and Amendment X of the United States Constitution, leading by steps to a re-examination of the Constitutional Convention of 1787. Even if this Court were to conclude that the questions raised were manageable and not political, the federal legislation at issue clearly does not present the "direct and positive" conflict which would justify such a rigorous inquiry into justiciability, textually demonstrable commitments and ultimate powers.

CONCLUSION.

For the reasons set forth above, Appellee The General Assembly of Pennsylvania respectfully submits that the question upon which this cause depends is not sufficiently substantial to warrant further proceedings; and Appellee respectfully moves Your Honorable Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered by the Supreme Court of Pennsylvania.

Respectfully submitted,

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